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## **LEGAL AND ETHICS CONFERENCE 2014**

### **ADMINISTRATIVE HEARINGS AND THE RIGHT TO AN IMPARTIAL DECISION MAKER**

#### **Legislative development**

#### **I. Administrative Adjudication Act (AAA).**

##### **A. 1947**

Whenever a hearing is conducted by an agent or representative of an agency such agent or representative who presides at such hearing shall not consult any person or party on any fact in issue unless upon notice and an opportunity for all parties to participate.

**IC 4-22-1-20 [63-3020] Acts of 1947, ch.365, Sec. 20.**

##### **B. 1985**

An administrative law judge's conduct shall be in a manner which promotes public confidence in the integrity and impartiality of the administrative hearing process.

**IC 4-22-1-20(a), P.L. 30-1985, Sec. 6.**

An administrative law judge shall disqualify himself in a proceeding in which the judge's impartiality might reasonably be questioned, or in which the judge's personal bias, prejudice, or knowledge of a disputed evidentiary fact might influence the decision.

**IC 4-22-1-20(b), P.L. 30-1985, Sec. 6.**

#### **II. Administrative Orders and Procedures Act (AOPA).**

##### **A. 1986**

Any individual serving . . . as an administrative law judge is subject to disqualification for:

(1) bias, prejudice, or interest in the outcome of a proceeding;

. . .

(2) any cause for which a judge of a court may be disqualified.

**IC 4-21.5-3-10(a) P.L. 18-1986, Sec. 10.**

Any party to a proceeding may petition for the disqualification of an individual serving alone or with others as an administrative law judge upon discovering facts establishing grounds for disqualification under this chapter. The administrative law judge assigned to the proceeding shall determine whether to grant the petition, stating facts and reasons for the determination.

**IC 4-21.5-3-9(d) P.L. 18-1986, Sec. 9.**

An individual who:

- (1) is serving alone or with others as an administrative law judge or as a person presiding in a proceeding under sections 28 through 31 of this chapter; and
- (2) knowingly or intentionally violates section 11, 12, or 13 of this chapter; commits a Class A misdemeanor.

**IC 4-21.5-3-36, P.L. 18-1986, Sec.1.**

A person who:

- (1) aids, induces, or causes an individual serving alone or with others as an administrative law judge or as a person presiding in a proceeding under sections 28 through 31 of this chapter to violate section 11, 12, or 13 of this chapter; and
- (2) acts with the intent to:
  - (A) have the individual described in subdivision (1) disqualified from serving in a proceeding; or
  - (B) influence the individual described in subdivision (1) with respect to any issue in a proceeding;commits a Class A misdemeanor.

**IC 4-21.5-3-37, P.L. 18-1986, Sec.1.**

B. 1987

If the administrative law judge ruling on the disqualification issue is not the ultimate authority for the agency, the party petitioning for disqualification may petition the ultimate authority in writing for review of the ruling within ten (10) days after the notice is served. The ultimate authority shall conduct proceedings described in section 28 of this chapter to review the petition and affirm, modify, or dissolve the ruling within thirty (30) days after the petition is filed. A determination by the ultimate authority under this subsection is a final order subject judicial review under IC 4-21.5-5.

**IC4-21.5-3-9(d)(1987) P.L. 35-1987 Sec. 7.**

C. 2014

- (a) An agency may share an administrative law judge with another agency:
  - (1) to avoid bias, prejudice, interest in the outcome, or another conflict of interest;
  - (2) if a party requests a change of administrative law judge;
  - (3) to ease scheduling difficulties; or

- (4) for another good cause. An agency may adopt rules under IC 4-22-2 to implement this subsection.
- (b) To the extent practicable, an administrative law judge must have expertise in the area of law being adjudicated.
- (c) An agency shall post on the agency's Internet web site the:
  - (1) name;
  - (2) salary and other remuneration; and
  - (3) relevant professional experience; of every person who serves as an administrative law judge for the agency.

**IC 4-21.5-3-8.5, P.L.72-2014, SEC.3.**

- (a) Except to the extent that a statute other than this article limits an agency's discretion to select an administrative law judge, the ultimate authority for an agency may:
  - (1) act as an administrative law judge;
  - (2) designate one (1) or more members of the ultimate authority(if the ultimate authority is a panel of individuals) to act as an administrative law judge; or
  - (3) designate one (1) or more:
    - (A) attorneys licensed to practice law in Indiana; or
    - (B) persons who served as administrative law judges for a state agency before January 1, 2014;to act as an administrative law judge. A person designated under subdivision (3) is not required to be an employee of the agency.

**IC 4-21.5-3-9(a), P.L.72-2014, SEC. 4.**

**D. Inspector General's responsibilities under P.L. 72-2014.**

- Sec. 9. (a) The inspector general shall adopt rules under IC 4-22-2 establishing a statewide code of judicial conduct for administrative law judges. The statewide code of judicial conduct for administrative law judges must apply to every person acting as an administrative law judge for a state agency.
- (b) The inspector general:
    - (1) shall review 312 IAC 3-1-2.5 and 315 IAC 1-1-2 in adopting a statewide code of judicial conduct for administrative law judges; and
    - (2) may base the statewide code of judicial conduct for administrative law judges on 312 IAC 3-1-2.5 and 315 IAC 1-1-2.
  - (c) A state agency may adopt rules under IC 4-22-2 to establish a supplemental code of judicial conduct for a person acting as an administrative law judge for that agency, if the supplemental code is at least as restrictive as the statewide code of judicial conduct for administrative law judges.
  - (d) The inspector general may adopt emergency rules in the manner provided under IC4-22-2-37.1 to implement a statewide code of judicial conduct for administrative law judges.
  - (e) The statewide code of judicial conduct for administrative law judges shall be enforced under IC 4-21.5. The inspector general is not responsible for enforcing

the statewide code of judicial conduct for administrative law judges or for investigating a possible violation of the statewide code.

**IC 4-2-7-9, P.L. 72-2014, Sec. 2.**

E. Rules the Inspector General is to consider.

*1. Rules of the Natural Resources Commission.*

312 IAC 3-1-2.5 Applicable provisions of the code of judicial conduct to administrative law judges

(a) The following definitions apply throughout this section:

...

(2) "Code of judicial conduct" refers to the code of judicial conduct adopted by the Indiana supreme court, effective March 1, 1993 (including amendments received through October 15, 2009).

...

(d) Unless otherwise specified in subsection (e), the provisions of the code of judicial conduct are applicable to an administrative law judge. These provisions shall be liberally construed to implement the intention of IC 14-10-2-2.

*2. Rules of the Office of Environmental Adjudication.*

315 IAC 1-1-2 Applicable provisions of the code of judicial conduct to environmental law judges

(a) The following definitions apply throughout this section:

(1) "Code of judicial conduct" refers to the code of judicial conduct adopted by the Indiana supreme court, effective March 1, 1993 (including amendments received through October 15, 2008).

...

(d) Unless otherwise specified in subsection (e), the provisions of the code of judicial conduct are applicable to an environmental law judge. These provisions shall be liberally construed to implement the intention of IC 4-21.5-7-6.

*3. Code of Judicial Conduct.*

**RULE 1.2 : *Promoting Confidence in the Judiciary***

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

## Comment

[1] Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.

...

[3] Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.

...

[5] Actual improprieties include violations of law, court rules, or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

## Case law development

The AOPA does not apply to all administrative hearings but due process concepts are universal to administrative proceedings.

### I. U.S. Supreme Court.

And, of course, an impartial decision maker is essential.

***Goldberg v. Kelly* (1970) 397 U.S. 254 at 271.**

### II. Indiana Supreme Court.

An administrative hearing “though regular in form” must “be in truth a fair hearing.”

***Stiver v. State ex rel. Kent*, 211 Ind. 380, 7 N.E.2d 183, 184 (Ind.1937).**

It is essential that the fact finders comport to due process standards. It also follows that the fact finding process should be free of suspicion or appearance of impropriety.

***City of Mishawaka v. Stewart*, 261 Ind. 670, 677, 310 N.E.2d 65, 69 (Ind. 1974).**

The Due Process Clause ensures that “no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance

that the arbiter is not predisposed to find against him.” *Marshall v. Jerico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980). Thus, self-dealing or bias on the part of a hearing officer would contravene not only the AOPA but the Constitution itself.

***LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1261 f.n.23 (Ind.2000).**

### III. Indiana Court of Appeals.

Our discussion first observes, by way of background, that it is settled law the tenure given a fireman or police officer such as Atkinson is a constitutionally protected interest requiring the opportunity for a fair hearing conducted in good faith before a full and impartial body. . . . Although such proceedings are not subject to all of the procedural safeguards afforded at a trial, it is evident, as our courts have held, that the procedural standards should be at the highest level workable under the circumstances, and that the fact-finding process should be free of suspicion or even the appearance of impropriety. (citations omitted).

***Atkinson v. City of Marion*, 411 N.E.2d 622, 628 (Ind.App.1980).**

Finally, the Clinic argues it was denied due process because the hearing officer who ruled on its claims was not impartial. Due process requires that those functioning in a quasi-judicial capacity be impartial. *Schweiker v. McClure*, (1982) 456 U.S.188, 102 S.Ct. 188, 72 L.Ed.2d 1. It is presumed, however, that hearing officers are unbiased, absent “a showing of conflict of interest or some other specific reason for disqualification.” *Id.* At 195, 102 S.Ct. at 1669.

***Hearing and Speech Clinic of Evansville, Inc. v. Indiana Dept. of Welfare, Medicaid Div.*, 466 N.E.2d 462, 466 (Ind.App.1984).**

Due process requirements in the context of administrative proceedings are clear in requiring that a hearing be conducted before an impartial body. . . . This, of course, means that agency members may not be swayed in their decisions by preconceived biases and prejudices.

. . .



Even though we must take New Trend's allegations of bias on the part of individuals as true, we may not assume that the Board will act on those biases and prejudices. To the contrary, we must presume the Board will act properly with or without recusal of the allegedly biased members. In the absence of a demonstration of actual bias, the courts should not interfere with the administrative process. (citations omitted)

***New Trend Beauty School, Inc. v. Indiana State Bd. of Beauty Culturist***

***Examiners*, 518 N.E.2d 1101, 1104-5 (Ind.App1988).**

Due process in administrative hearings requires that all hearings be conducted before an impartial body. . . . This requirement means that agency members may not be swayed in their decisions by preconceived biases and prejudices. . . . We presume, however, that administrative agencies will act properly with or without recusal of allegedly biased members. *Id.* When a biased board member participates in a decision, the decision will be vacated. . . . In the absence of a demonstration of actual bias, however, we will not interfere with the administrative process. (citations omitted).

***Ripley County Bd. Of Zoning Appeals v. Rumpke of Indiana, Inc.*, 663 N.E.2d 198, 209 (Ind.App.1996).**

Due process requirements in the context of administrative proceedings are clear in requiring that a hearing be conducted before an impartial body. . . . However, we will presume that an administrative board will act properly. . . . In the absence of a demonstration of actual bias, the courts should not interfere with the administrative process. (citations omitted)

***Kollar v. Civil City of South Bend*, 695 N.E.2d 616, 623 (Ind.App1998).**

Due process in administrative hearings requires that all hearings be orderly, judicious, fundamentally fair, and conducted before an impartial body. . . . This requirement means that agency members' decisions may not be swayed by preconceived biases and prejudices. . . . When a biased board member participates in a decision, the decision will be vacated. *Id.* Nevertheless, because a zoning board is a body usually composed of persons without legal training, courts are reluctant to impose strict technical requirements upon their procedure. . . . Furthermore, in the absence of a demonstration of actual bias, we will not interfere with the administrative process. (citations omitted).

***City of New Haven v. Chemical Waste Management of Indiana, L.L.C.*, 701 N.E.2d 912, 921 (Ind. App.1998).**

Although *Fail* involved the same statute at issue here, the case arose from an administrative, or quasi-judicial, determination. Due process requires a neutral, unbiased decision maker in such situations. *Rynerson v. City of Franklin*, 669 N.E.2d 964, 967 (Ind.1996) (quoting KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.8 (1994)).

***Perry-Worth Concerned Citizens v. Board of Com'rs of Boone County*, 723 N.E.2d 457, 460 (Ind.App.2000).**

Due process also requires that administrative bodies may not reach their decisions on the basis of preconceived bias or prejudice. . . . Biased behavior may be demonstrated by extreme partisan political considerations, personal conflicts of interest and gain, or invidious discriminatory intent. (citations omitted)

***City of Hobart Common Council v. Behavioral Institute of Indiana, LLC*, 785 N.E.2d 238, 253 (Ind.App.2003).**

In the context of an administrative proceeding, due process requires that a hearing be conducted before an impartial body. . . . This requirement suggests that agency decisions may not be swayed by preconceived biases and prejudices. . . . Consequently, when a biased board or panel member participates in a decision, the decision will be vacated. *Id.* Nevertheless, because many administrative boards or panels are usually composed of persons without legal training, courts are reluctant to impose strict technical requirements upon their procedure. *Id.* Indeed, in the absence of a demonstration of actual bias, we will not interfere with the administrative process. *Id.* Instead, we presume that an administrative board or panel will act properly and without bias or prejudice. (citations omitted).  
***In re Change to Established Water Level of Lake of Woods in Marshall County*, 822 N.E.2d 1032, 1041 (Ind.App.2005).**

Police merit board hearings are administrative actions that, although less formal than civil proceedings, as a matter of due process require a full and fair hearing conducted in good faith before an impartial body. . . . With respect to administrative boards or panels generally, because they often are composed of persons without legal training, “courts are reluctant to impose strict technical requirements upon their procedure.” *In re Change to Established Water Level of Lake of Woods in Marshall County*, 822 N.E.2d 1032, 1041 (Ind.Ct.App.2005) *trans. denied*. “Indeed, in the absence of a demonstration of actual bias, we will not interfere with the administrative process. Instead, we presume that an administrative board or panel will act properly and without bias or prejudice.” *Id.* (citation omitted).

. . .

For guidance on this point, we look to some cases addressing the political activities of a judge and whether recusal of the judge is necessary, while keeping in mind that judges are held to a higher standard when it comes to conflicts of interest than are members of an administrative body.

***Jandura v. Town of Schererville*, 937 N.E.2d 814, 819 & 820 (Ind.App.2010).**



Thus, where a municipality actively seeks to avoid the appearance of impropriety and there is no evidence of actual impropriety, due process rights are not violated when a municipality's employees serve as advocates and different employees of the same municipality serve as decision-makers in administrative proceedings. ***Utility Center, Inc. v. City of Fort Wayne*, 960 N.E.2d 824, 873 (Ind.App.2012), trans. granted, opinion vacated by *Utility Center, Inc. v. City of Fort Wayne*, 985 N.E.2d 731 (Ind.2013).**

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